**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION SIX**

JSP INTERNATIONAL, L.P. D/B/A
JSP INTERNATIONAL[1]

Employer

and **Case** 6-RC-11853

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

Petitioner

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Betty J. Martin, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.[2]

Upon the entire record[3] in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The name of the Employer appears as amended at the hearing.

[2] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 l4th Street, N.W., Washington, D.C. 20570-000l. This request must be received by the Board in Washington by August 18, 2000.

[3] The Employer filed a timely brief in this matter which has been duly considered by the undersigned.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

The Petitioner seeks to include in a single unit all full-time and regular part-time production and maintenance employees employed by the Employer at its Butler, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. Although the parties are basically in accord with both the scope and composition of the unit, the Petitioner, contrary to the Employer, would exclude approximately 34 employees of six employment agencies referred to the Employer and used by the Employer to perform unit work (herein contingent employees). The grounds for exclusion are that these employees are not solely employed by the Employer and that, therefore, it would be inappropriate to include them in the unit since, assuming a joint employer relationship exists between each of the employment agencies and the Employer, all of the employment agencies do not consent to their respective contingent employees inclusion in the unit. See Greenhoot, Inc., 205 NLRB 250 (1973) and its progeny. There are approximately 150 employees in the petitioned-for unit. There is no history of collective bargaining for any of the employees involved herein except to the extent set forth below. The Petitioner does not wish to proceed to an election if contingent employees are included in the unit.

The Employer is engaged in the manufacture and nonretail sale of polypropylene energy absorbers, such as automobile bumpers, at its Butler, Pennsylvania, facility (the facility). The facility, which is under the overall supervision of Plant Manager Jeff Smith, is basically divided into three departments: extrusion, expansion and molding. The production process essentially entails extruding raw polypropylene into pellets, which are expanded and then made into absorbers. The facility operates on a 7-day a week, 24 hours a day basis. Employees work on a rotating 12-hour shift basis, three or four days on and three days off.

It appears that since the Employer commenced operations at the facility in 1995, in order to augment its regular production and maintenance workforce, it has utilized contingent employees referred by various employment agencies. According to the Employer, one of the primary reasons it utilizes contingent employees is because its production needs fluctuate depending on the orders from its customers, particularly customers in the automobile industry. At the present time, six employment agencies refer contingent employees to the Employer: Temps Unlimited (Temps), Manpower, Inc. (Manpower), Gregg Services (Gregg), Samas Corporation (Samas), Select Personnel (Select) and Temps Personnel (TP).[4] It further appears that since the time the Employer commenced operations, Temps has supplied the vast majority of the contingent workforce. At the time of the hearing, the Employer's contingent workforce consisted of 26 employees referred by Temps, three employees referred by Manpower, one employee referred by Gregg, one employee referred by Samas, three employees referred by Select and no employees referred by TP.

In a prior case, Case 6-RC-11613, the Petitioner sought to represent in a single unit the production and maintenance employees employed solely by the Employer and approximately 13 contingent employees referred by either Temps or Manpower. At that time, Temps and Manpower were the only employment agencies used by the Employer for contingent employee referral. In that case, the Employer and the Petitioner, contrary to Temps, took the position that Temps was a joint employer with the Employer. Temps, in the alternative, argued that if a joint employer relationship existed, it did not consent to the inclusion of its referred contingent employees in the unit sought therein. Manpower agreed that it was a joint employer with the Employer and further consented to the inclusion of its referred employees in the unit. On January 13, 1999, the undersigned issued a Decision and Direction of Election wherein I found

[4] Each of the employment agencies were served with the Notice of Hearing in this matter in order to afford each of them the opportunity to appear and participate in the hearing. Temps and Manpower were so notified by fax on July 11, 2000, and Gregg, Samas, TP and Select were so notified by fax on July 17, 2000. On July 18, 2000, the hearing opened and was continued to July 20, 2000, to give the employment agencies additional time to respond. The employment agencies, on July 18, 2000, were served by fax with the Notice of Continued Representation Hearing.

that Temps and Manpower enjoyed a joint employer relationship with the Employer and that the contingent employees enjoyed a sufficient community of interest with the employees employed solely by the Employer to warrant their inclusion in the unit if consent by the joint employers existed. Noting that Temps did not consent, I nevertheless permitted contingent employees referred by Temps to vote in the election subject to challenge so that an anomalous result would not ensue wherein certain contingent employees were included in the unit and permitted to vote while others were not. The Employer's request for review of my decision was denied by the Board. However, at the election, the Petitioner did not receive a majority of the valid votes case and the challenged ballots were not sufficient in number to affect the results of the election. Accordingly, a Certification of Results issued.[5]

The Employer has traditionally used this "pool" of referred employees to fill regular positions when its workforce needs so require. According to Employer Human Resource specialist Yvonne Jungle, approximately 90 percent of the Employer's non-contingent employee workforce is comprised of former contingent employees. Jungle further testified that since the beginning of the year the Employer has utilized the services of approximately 100 different contingent employees, with approximately 15 of those employees being subsequently hired by the Employer.[6]

Generally, the Employer does not hire a contingent worker as a regular employee during the referred employee's initial 90-day period from the date of referral. After 90 days, if the Employer has an opening for a regular employee, a contingent worker more than likely will be offered the position if the employee's performance and attendance are satisfactory.[7] If no

[5] My decision in Case 6-RC-11613 was received in evidence in this matter as a Board exhibit. The parties agreed at the hearing that the facts set forth therein remain generally unchanged except as supplemented in the instant hearing.

[6] The Employer also recruits new employees through newspaper advertisements or the Pennsylvania Job Center.

[7] Contingent employees who are hired as regular employees are credited for their time as a contingent employee for the purpose of eligibility for benefits.

openings are available, the contingent employee, at their option, may remain working at the facility through referral. All candidates for regular employment are interviewed by the Employer and sent for a pre-employment physical and then placed on the Employer's payroll.

It is clear from the record that the Employer uses the employment agencies to recruit, test and screen applicants for entry-level employment and that the Employer uses the employees' period as contingent workers as the employees' probationary period. When the Employer is in need of employees, it contacts the employment agencies. The agencies maintain an "interest" file for the Employer and give brochures, created by the Employer, to potential employees. The Employer has submitted to the employment agencies the criteria the agencies should utilize for determining who to refer. In this regard, the Employer requires the possession of a high school diploma, familiarity with fork truck operation and the passing of two pre-assessment tests (a math test and a perception test) developed by the Employer. The employment agencies screen candidates based upon the above criteria and send selected candidates for referral for a drug screen test which is paid for by the Employer. The employment agencies, upon the candidate's passing of the drug test, inform the Employer of the referral's identity and the Employer, thereupon, will inform the agency of the individual's start date and crew assignment. The Employer, itself, does not interview candidates prior to referral, and the employment agencies are solely responsible for making decisions whether to refer particular workers to the Employer.

Newly referred contingent employees, like all new hires, receive a week's training and orientation and are supervised on a day to day basis by the Employer's shift supervisors. None of the employment agencies have on-site representatives to supervise the referred workers.

Contingent workers receive an hourly wage of $8.00, compared to an $8.75 hourly rate received by entry level regular employees.[8] Personnel files for the contingent employees are maintained by the employment agencies. Contingent employees prepare weekly time slips

[8] The Employer pays to the employment agencies an hourly fee for each referred worker.

which are submitted to the employment agencies so that the agencies can pay these employees. The Employer's shift supervisors must sign off on the time slip and the Employer retains a copy for its records. All payroll deductions from the contingent employees' pay are made by the employment agencies and it is the employment agencies who are the employing entity for IRS purposes.

Contingent employees are subject to the same rules and regulations as regular employees including, inter alia, work times, break times, specific job functions, work procedures, call off policy and safety policy. The contingent employees are scheduled to work in the same manner as the Employer's regular employees and they work the same shift rotation and hours as the regular employees. If the facility is closed over a holiday, the contingent employees do not work. The employment agencies determine any holiday pay and vacation days of contingent employees.

With respect to call offs, the record indicates that the contingent employees must notify the Employer and their employment agency to report that they will not be at work. Contingent employees who are having performance problems are initially counseled by Employer representatives without agency involvement. If a contingent employee continues to exhibit substandard performance, the agency is notified and it counsels the employee as well. After that point, if performance or attendance problems persist, the Employer will notify the agency that it no longer wishes to have that employee working at the facility. The agency, in turn, will so notify the contingent employee and either terminate the employee or have the employee reassigned to another employer.

As noted, the Board has long held, as a general rule, that it will not include employees in the same unit, if they do not have the same Employer, absent employer consent from all the appropriate employers. Greenhoot, Inc., supra; Lee Hospital, 300 NLRB 947, 948 (1990); The Brookdale Hospital Medical Center, 313 NLRB 592 (1993); Hexacomb Corporation, 313 NLRB 983 (1994). The positions of the employment agencies with respect to their joint employer relationship with the Employer and the inclusion of their referred contingent employees in the

petitioned-for unit are as follows. Temps and Gregg both submitted written position statements wherein they both agreed that each was a joint employer with the Employer with regard to the contingent employees referred by them and that each consented to their respective referred employees being included in the unit. Select orally informed the Region, prior to the opening of the hearing, that it, too, would consent to the inclusion of its referred contingent employees in the unit. Both Manpower and TP orally advised the Region, prior to the opening of the hearing, that each took no position with respect to the issues raised by the instant petition.[9] Samas, by a written position statement, advised the Region that it does not consent to its referred employees being included in the unit.[10] In summary, only three of the six employment agencies have consented to the unit inclusion of their respective referred contingent employees.

The Employer contends that the only appropriate unit in this case is one comprised of those production and maintenance employees employed solely by the Employer together with the pool of contingent employees referred by all of the employment agencies. In this regard, the Employer contends that each of the six employment agencies are joint employers with it with respect to those employees referred by each of those agencies. The Employer further avers that all the contingent employees, irregardless of the referring employment agency, share a sufficient community of interest with the unit employees to compel a conclusion that they must be included in the unit as a class. However, the Employer recognizes that based upon existing case law set forth above, the Board will not include employees of a joint employer in a unit with employees of a single employer, unless the joint employers consent. Thus, the Employer contends that absent consent of all the employment agencies, the undersigned should nevertheless include all the contingent employees in the unit since the Board has indicated that the principles set forth in Greenhoot may be re-examined due to the increased use of contract

[9] Select, TP and Manpower have not submitted written statements concerning the issues raised by the petition. At the hearing, the hearing officer read into the record oral positions communicated by each of them to the Region. None of these employment agencies appeared at the hearing.

[10] The position statements of Temps, Gregg and Samas were received in evidence as Board exhibits. None of the aforementioned parties appeared at the hearing.

labor to perform duties formerly performed by permanent employees. In this regard, the Employer surmises that contingent employees will undoubtedly be included in the bargaining units in the near future where a joint relationship exists, without the requirement of consent.[11] Accordingly, the Employer urges that in the instant case since three of the six employment agencies have given consent, including Temps which refers the vast majority of workers to the Employer, it would be entirely appropriate to include all of the contingent employees in the unit or otherwise an anomalous result would ensue wherein certain contingent employees are included in the unit and permitted to vote while others are not. The Employer does not, in the alternative, contend that those contingent employees referred by those employment agencies who have given consent should be included in the unit while the other contingent employees should be excluded.

The Petitioner, as noted, does not seek to represent any of the contingent employees and would not proceed to an election if any of these contingent employees are included in the unit. In these circumstances, based upon its position described above, the Employer asserts that the petition must be dismissed.

The initial issue to be resolved is whether a joint employer relationship exists between the Employer and the employment agencies. A joint employer relationship exists where two separate business entities share or codetermine the essential terms and conditions of employment and where one employer meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction, over employees employed by the other employer. Lee Hospital, 300 NLRB 947 (1990); TLI, Inc., 271 NLRB 798 (1984); Laerco Transportation, 269 NLRB 324 (1984). In Holyoke Visiting Nurses Association, 310 NLRB 684 (1993), enf'd. 11 F.3d 302 (1st Cir, 1993), the Board found that a nursing referral

[11] The Employer bases its assumption on the ground that the Board has granted review in two cases where the Greenhoot consent principles have come under challenge. Jeffboat Division, American Commercial, Case 9-UC-406 and M. B. Sturgis, Case 14-RC-11572, and on remarks made former Board Chairman William B. Gould while he was a member of the Board on the topic of the continued viability of the consent requirement.

agency and a home health care provider were joint employers of the agency's nurses referred by the agency to the provider. The agency's responsibilities included hiring the nurses and setting their wage rates, paying the nurses' wages and benefits, paying the nurses' workers' compensation and other insurance, and withholding state and federal payroll deductions. The home care provider had the authority to refuse a nurse referred to it or request the removal of a nurse, to schedule and assign work to nurses, to subject the nurses to its own policies and procedures, and to direct the daily work of the nurses through its supervisors. See also Windemuller Electric, Inc., 306 NLRB 664 (1992), where an electrical contractor and an employment agency were found to be joint employers of tradespersons supplied by the agency to the contractor.

For the reasons set forth herein, and consistent with my decision in Case 6-RC-11613, I find that the Employer and the employment agencies codetermine, for these contingent employees, essential terms and conditions of employment and therefore are joint employers of the referred employees. The agencies recruit, screen and hire the referred employees.[12] The agencies compensate these employees, based on the hourly wage rate established by the Employer, and make contributions and deductions for them as required by law. The Employer identifies the criteria that contingent employees must satisfy before they can work at the facility, orients each new contingent employee, maintains a personnel file on them, establishes labor relations policies applicable to these employees, sets the work schedules and assigns work to these employees, and directs and supervises the contingent employees on a daily basis with its own supervisors. It appears that both the Employer and the agencies, as detailed above, are involved in the discipline of the contingent employees at the lower level. The Employer may "counsel" the referred employees and may request that the agencies not send the referred employee to the Employer again, but the employment agencies determine whether the referred

[12] As noted, there is no evidence contained in the record to suggest that the Employer normally interviews these employees before referral or that it retains the right to reject any employee referred.

employee will be sent to another facility or terminated. Accordingly, based upon the above and established case law, it is clear that the Employer and the employment agencies are joint employers of the contingent employees referred respectively by each of them. The Brookdale Hospital Medical Center, supra; Hexacomb Corporation, supra; Holyoke Visiting Nurses Association, supra; Windemuller Electric, Inc., supra.

Having found joint employer status between the Employer and the employment agencies, it cannot be concluded either that the contingent employees must all be included in the petitioned-for unit as a class and the petition therefore dismissed because the Petitioner has indicated its desire not to proceed to an election in a unit which includes the referred workers, or that the petition must be dismissed on the ground that in view of the absence of consent on behalf of all the employment agencies, which results in the contingent workers as a class being excluded, the petitioned-for unit is rendered inappropriate for the purposes of collective bargaining. Rather, the issue presented is whether the petitioned-for unit, which is an employer-wide unit of all the Employer's production and maintenance employees, is appropriate for collective bargaining purposes. To be sure, a unit composed of both the permanent employees and the referred contingent employees may be, in the circumstances, the optimum appropriate unit if a labor organization was seeking to represent the employees on that basis and the question of joint employer consent was not an issue. But no labor organization is seeking to represent the contingent employees as part of the Employer's production and maintenance unit. Further, all of the joint employers do not consent to the inclusion of their referred workers in the unit. Therefore, in order to avoid the anomalous result of certain contingent employees being included in the unit while others are not, I find that contingent employees, as a class, must be excluded from the unit.[13] In reaching this conclusion, I note that the contingent employees, as a class, have interests separate and apart from the unit

[13] I cannot agree with the Employer's urgings that I disregard existing case law and include all the contingent workers in the unit as a class since three of the six joint employers who refer the vast majority of the workers have given consent. The Board's precedents are controlling herein and I am duty bound to follow those precedents.

employees. In this regard, note that all of the contingent employees have the option of obtaining other employment at other work sites of the referring agencies even if they perform poorly at the Employer. Further, I find it significant that even if the work performance of the contingent workers is satisfactory, there is no guarantee that they will be hired on a permanent basis by the Employer. The potential for permanent employment is conditioned in large part on available job openings. Indeed, since the beginning of 2000, only approximately 15 of 100 contingent employees have been hired on a permanent basis by the Employer. Thus, it cannot be concluded that at the time of their referral to the Employer, the contingent employees have a reasonable expectation of permanent employment. Consequently, the exclusion of the contingent employees does not render the petitioned-for unit inappropriate. It remains a single employer-wide unit of production and maintenance employees, a unit clearly appropriate for collective bargaining purposes.

Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[14]

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Butler, Pennsylvania, facility; excluding employees referred by other entities, office clerical employees and guards, professional employees and supervisors as defined in the Act.

## DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[15] Eligible to

[14] The parties are in agreement that the three engineering technicians, the molding trainer, the quality control specialist, the extrusion lead operator, the lead shipper and the quality control technicians are appropriately included in the unit.

[15] Pursuant to Section l03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to l2:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional

vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[16] Those eligible shall vote whether

Office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

[16] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (l966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (l969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room l50l, l000 Liberty Avenue, Pittsburgh, PA l5222, on or before August 11, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

or not they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

Dated at Pittsburgh, Pennsylvania, this 4th day of August 2000.

/s/Gerald Kobell
Gerald Kobell
Regional Director, Region Six

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